Petition

81-1711

No. ———

Office - Supreme Court, U.S.
FILED
MAR 16 1982
ALEXANDER L. STEVAS
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

———

R. PAUL MCNEW,

Petitioner,

vs.

THE BANK OF MOUNT VERNON, et al.,*

Respondents.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

———

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QUESTION PRESENTED

1. Whether Petitioner stated a cause of action pursuant to Section 1983 wherein he alleged: (1) he was wrongfully terminated from his employment as a result of coercion by a state official acting under color of state law, and; (2) that his professional reputation was destroyed as a result of defamation which occurred in connection with his termination.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. ———

R. PAUL MCNEW,

Petitioner,

vs.

THE BANK OF MOUNT VERNON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, R. PAUL MCNEW, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 22, 1981.

OPINIONS BELOW

A. The Order and Opinion of the Court of Appeals, not yet reported, appears in the appendix hereto.

B. The Order and Memorandum Opinion of the United States District Court for the Eastern District of Kentucky, not reported, also appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 22, 1981, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Amendment 5:

> "No person shall be . . . deprived of life, liberty or property without due process of law . . . ."

Constitutional Amendment 14:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

42 U.S.C. section 1983; CIVIL ACTION FOR DEPRIVATION OF RIGHTS

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress."

STATEMENT OF THE CASE

A. Proceedings Below

On March 11, 1977, Petitioner filed a complaint and thereafter filed an amended complaint in the District Court for the Eastern District of Kentucky, Civil Action number 77-69 alleging he had been deprived of a constitutionally protected right or liberty interest in violation of 42 U.S.C. 1983. The Defendants below, Respondents here, filed Answers, and, thereafter, filed Motions to Dismiss contending the complaint failed to state a cause of action under which relief could be granted. Respondents' motion to dismiss was granted, and the Court of Appeals for the Sixth Circuit affirmed.

B. Complaint

Petitioner alleged in his complaint that he was employed by the Bank of Mt. Vernon, at Mt. Vernon, Kentucky, that both he and the Bank wished to continue the employer/employee relationship. The Respondent Williams, the State Banking Commissioner for the Commonwealth of Kentucky, wrongfully used his power in that position to force the termination of Petitioner's employment, by threatening Petitioner and any member of the Board of Directors who supported him with criminal prosecution. During the confrontation, Williams refused to allow Petitioner an opportunity to consult with and be represented by counsel. In the course of Petitioner's termination, he was characterized a thief, an embezzler and a criminal thereby destroying his good name and professional reputation. Further, Petitioner alleged the other Respondents conspired with the Respondent Williams in this process, thereby making them liable under 42 U.S.C. Section 1983.

The District Court determined that to state a cause of action under Section 1983, the complaint must allege: (1) the defendants acted under color of state law, and (2) the defendants deprived petitioner of rights, privileges or immunities secured by the Constitution and Laws of the United States. The District Court determined that Petitioner had alleged state action, and that the private individual Defendants joined and acted in conspiracy with the state official, but went on to say that Petitioner had no property interest in his employment cognizable under Section 1983; stating:

> To determine whether one has a constitutionally protected property or liberty interest, state law must be consulted, and there appears to be no state law providing for a property interest under the facts of this case. . . .
>
> If all plaintiff's allegations were true, as was assumed for the purpose of ruling on these motions to dismiss, then the defendants may have been guilty of reprehensible conduct, which seriously injured the plaintiff. However, there is no general federal tort law.

Petitioner appealed to the Court of Appeals for the Sixth Circuit, which affirmed.

REASONS FOR GRANTING WRIT

I. THE DECISION OF THE COURT OF APPEALS HOLDING THAT THE RIGHT TO PURSUE ONE'S LIVELIHOOD FREE FROM ARBITRARY AND ILLEGAL STATE ACTION IS NOT A RIGHT PROTECTED BY THE CONSTITUTION OF THE UNITED STATES IS AN IRRECONCILABLE CONFLICT WITH THIS COURT'S HOLDING IN TRUAX v. RAICH, 239 U.S. 33 (1915).

The District Court and the Court of Appeals determined for purposes of ruling on the complaint that state action was present and that the private individuals joined in and acted in concert with the state official. The court further held, however, that petitioner failed to allege the deprivation of a federally protected right in that he had no "property" interest in his employment cognizable under Section 1983. In arriving at its decision, the court applied principles of law as set forth in *Bishop* v. *Wood,* 426 U.S. 341 (1976). *Bishop* is not dispositive of the issue presented in this case for at least three reasons, namely: (1) that case involved the termination of an employee, a police officer, by his employer, the city, which it had the right to do under its city ordinances; (2) there was no stigma resulting from defamation in connection with the termination; and (3) there was no denial of his right to consult with counsel. The instant case, on the other hand, involves: (1) third party interference with an employer/employee relationship in the form of state action resulting in termination of Petitioner's employment; (2) coupled with stigma resulting from defamation occurring during the process; and (3) a refusal during the process to allow Petitioner an opportunity to consult with counsel. The

issue addressed by this Court in *Bishop* is not the issue presented by the instant case.

This Court has, however, addressed the precise issue presented in the instant case in an earlier decision. In *Truax* v. *Raich*, 239 U.S. 33 (1915), this Court clearly held that one has a constitutionally protected liberty or property interest in the pursuit of his livelihood free from third party state interference within the meaning of Section 1983. Although in that case, the constitutionally protected right to pursue one's livelihood was afforded protection from state action by way of the Equal Protection Clause, it follows that the basic right to pursue one's livelihood is no less deserving of constitutional protection by way of the Due Process Clause. That case involved state action by way of a state statute which limited the number of resident aliens an employer could hire, thereby interfering with the Petitioner's right to pursue his livehood. This Court held in that case the right to pursue one's livelihood "is the essence of that personal freedom and opportunity which it was the purpose of the Fourteenth Amendment to secure". The District Court nevertheless distinguished that case from the instant case in its Memorandum in response to Petitioner's Motion to Vacate as follows:

> The *Truax* v. *Raich* decision is unpersuasive because:
>
> a. Whatever controlling authority it may have had when promulgated in 1915 was severely undermined more recently when the Supreme Court decided *Bishop* v. *Wood*, 426 U.S. 341 (1976), and other employment-termination cases.
>
> b. The Truax case dealt with an equal protection attack on a state statute which made it more difficult for an alien to get *any* job. In contrast, the instant

> case is a due process suit based on alleged informal acts by a state official which caused plaintiff to lose only a particular banking job. In *Board of Regents* v. *Roth,* 408 U.S. 564, 574 (1972), the Supreme Court distinguished *Truax* v. *Raich* on this basis as being inapplicable to a 42 U.S.C. Section 1983 suit somewhat similar to the one at bar.
>
> Finally, it is noted that a property interest in employment is not entitled to constitutional protection unless it is recognized by state law. *Parham* v. *Hardway,* 555 F 2d 139, 141 (6th Cir. 1977). Under Kentucky law, there is no property right in an expectation of continued private employment where the employment contract is terminable at will. This is a well established principle. See e.g. Seroghan v. Kraftco Corp., 551 S W 2d 811 (Ky. Ct. App. 1977).

It is submitted that while *Bishop, supra,* did indeed hold that there is no property interest in an employment at will, it was not intended to overrule, limit or erode in any way the application of the principles mandated by *Truax, supra,* wherein this court stated:

> The fact that an employment is at the will of the employee does not make it one at the will of others, and unjustified interference of third parties is actionable although the employment may be at will . . . . The right to work for a living in the common occupation of the community is the essence of that personal freedom and opportunity which it was the purpose of the Fourteenth Amendment to secure.

The lower court further distinguished *Truax, supra* on the grounds that it dealt with an equal protection attack on a state statute which made it more difficult for an alien to get any job while the instant case is a due process case suit based on state action which caused Petitioner to lose only a particular job. This reasoning fails to acknowl-

edge the Petitioner's allegations in his complaint. The Petitioner alleged he was wrongfully terminated from his employment through state action and in connection therewith he was characterized a thief, a criminal and an embezzler and his professional reputation was thereby destroyed. It follows that stigma resulting from defamation which undermines one's professional reputation for honesty and integrity in an industry that is particularly sensitive to those qualities not only results in the loss of a particular banking job, but will also have an adverse effect upon his chances of obtaining employment in any banking job. The lower court further held that *Truax, supra* had been distinguished by this court from *Roth* v. *Board of Regents,* 408 U.S. 564 (1972). That case, like *Bishop, supra,* presents a completely different issue. There, the question was whether refusal by a University to renew a teaching contract which by its terms expired was actionable under Section 1983. The Petitioner there had no property interest in his job, beyond the terms of his one-year contract, there was no defamation in connection with the termination, and he was free to pursue other employment as a teacher. The instant case does not challenge the right of an employer to terminate an employee, but it does challenge the right of government as a third party to interfere with the employer-employee relationship.

While it is rare for government officials to abuse their authority and interfere with private employment, we are not without precedent. One such case which tends to focus on the issue presented by the instant case and distinguish it from "employment at will" cases is *Stokes* v. *Lecce,* 384 F. Supp. 1039 (E.D. Pa. 1974). The court there was faced with a situation strikingly similar to the case at bar and applied the principles mandated by *Truax, supra,* to a Due Process case as opposed to an Equal Pro-

tection case. The Plaintiff had been a racetrack official, employed by a private concern as a placing judge. The defendant was a state racing official who, for some reason, did not want the Plaintiff to continue in his position. The defendant used his position as a state official to exert pressure on the Plaintiff's employer. As a result, Plaintiff's employment as a placing judge was terminated. The Plaintiff brought an action pursuant to Section 1983, alleging that he had been terminated as a placing judge by his employer due to the interference by Lecce, a state official. The court there distinguished a typical employment-at-will case and an employment case involving interference by a third party state official acting under color of state law as follows:

> It would not be accurate to state that Stokes had a constitutionally protected interest in the job as a placing judge. As between Stokes and the Racing Association, the latter could have changed its mind and withdrawn the appointment, or it might have terminated the employment at anytime, at the most risking a breach of contract claim. *The constitutionally protected right which Stokes did have was to be free from the exertion of the power of a state official's office to interfere with employer-employee relationship.* . . ., 384 F. Supp. 1047, 1948. (Emphasis added).

In the instant case, as in *Stokes, supra,* a public official used the power of his official office to force the termination of a private employment relationship. The right to pursue private employment free from arbitrary government interference is a basic personal freedom reserved to the people by the Fourteenth Amendment. A violation of that right deprived the Petitioner of a "right secured by the Constitution" even though Petitioner had no property interest in his employment under state law as between him

and his employer. Petitioner has, therefore, alleged deprivation of a federally protected right cognizable under Section 1983 and accordingly has stated a claim under which relief may be granted. Accordingly, the decisions of the lower courts are in irreconcilable conflict with this Court's decision in *Truax, supra.*

II. THE HOLDING OF THE SIXTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE THIS CONFLICT.

In addition to the holding of the Court of Appeals being in conflict with *Truax, supra* it results in a conflict between circuits. The Court of Appeals for the District of Columbia addressed the precise issue presented in the instant case in *Feinberg* v. *F.D.I.C.,* 522 F. 2d 1335 (D.C. Cir. 1975).

That case, like the instant case, involved governmental interference with private employment in a very similar setting. Feinberg was the director of a bank under the jurisdiction of the Federal Deposit Insurance Corporation. An indictment was returned charging Feinberg with certain violations of law. The FDIC issued a Notice which effectively removed Feinberg from his position at the bank, and Feinberg sought a three-judge panel to hear his claim of a Constitutional deprivation. The panel was denied, but the Court of Appeals for the District of Columbia reversed the lower court, saying that the Notice "deprived him of liberty and property within the meaning of the Due Process Clause." Id. at 1339-1340.

The District of Columbia Court of Appeals held that Feinberg had a constitutionally protected right to be free from arbitrary government interference with his employment. Since Feinberg was deprived of his right through Federal governmental action, not state action, he chose to vindicate his right via a three-judge Constitutional panel, not via Section 1983. The question of law presented in *Feinberg,* however, is identical to the question of law in the instant case. Both cases address the question of whether the right to pursue one's livelihood free from arbitrary government interference is a constitutionally protected right. The District of Columbia Court of Appeals in *Feinberg,* answered this question in the affirmative while the Sixth Circuit Court of Appeals, in the instant case, answered this question in the negative. Even though *Feinberg* is not a Section 1983 case, the issue presented is identical to the instant case and the result reached therein is in direct conflict with the opinion of the Sixth Circuit in this case.

Therefore, the decision of the Court of Appeals in the instant case results in a conflict between the circuits which must be addressed in order to assure uniformity in the application of the law within the various circuits.

III. THE HOLDING OF THE COURT OF APPEALS THAT THE STATEMENT OF THIS COURT IN PAUL v. DAVIS, 424 U.S. 693 (1976), THAT "LOSS OF EMPLOYMENT COUPLED WITH STIGMA CAUSED BY DEFAMATION AMOUNTS TO THE LOSS OF A FEDERALLY PROTECTED RIGHT" IS DICTA IGNORES THE MANDATE OF THIS COURT IN MORE RECENT DECISIONS.

The decision of the district court which was not disturbed by the Court of Appeals held that under *Bishop, supra,* the Petitioner must point to the deprivation of some property right or interest to state a claim under Section 1983, and that to determine whether one has a constitutionally protected property or liberty interest, state law must be consulted. The court concluded: "There appears to be no state law providing for a property interest under the facts of this case". The Petitioner argued that the facts alleged in the instant case distinguished it from *Bishop, supra,* and that under *Paul, supra,* the loss of employment coupled with damage to reputation did amount to the deprivation of a federally protected right cognizable under Section 1983. The District Court, while acknowledging this language in *Paul, supra,* distinguished it from the instant case on page 4 of its Memorandum as follows:

> The Plaintiff's memorandum points to some statements from *Paul* v. *Davis, supra,* to support a contention that defamation plus loss of employment is a sufficient interest to invoke the procedural protection of the Due Process Clause. It is this Court's opinion that those statements (424 U.S. at 701) refer to situations involving the loss of *public,* not private em-

> ployment, such as in *Colaizzi* v. *Walker,* 542 F. 2d 969 (7th Cir. 1976) *cert. denied,* 430 U.S. 969 (1977). In any event, as the plaintiff concedes in his Memorandum in opposition to the motion to dismiss, the statements are merely dicta.

In a more recent decision, *Owens* v. *City of Independence,* 445 U.S. 622 (180), this Court mandated that loss of employment coupled with stigma amounted to the loss of a right cognizable under Section 1983, and accordingly, the Petitioner's reliance on the statements from *Paul,* has been underpinned by this Court's mandate in *Owens.* There remains the question of whether this Court "intended this principle to apply exclusively to 'Public Employment' cases".

In *Paul* v. *Davis, supra,* the plaintiff was a private citizen who, *arguendo,* had been defamed by a police chief who had distributed his name and picture as a known criminal. The plaintiff sued under Section 1983. This Court held that mere defamation, without more, was not a sufficient injury to amount to the deprivation of a federally protected right. The opinion went on to note, however, that defamation plus something else, such as loss of employment, might be cognizable under Section 1983.

In *Owens,* the plaintiff was an employee of the city police department who was terminated under circumstances which caused him to be defamed. The plaintiff acknowledged he had no property interest in his job. This Court, however, followed its early statements from *Paul, supra,* and held that the plaintiff stated a cause of action, since he alleged loss of employment plus stigma. This Court did not indicate a distinction between *public* and *private* employment in *Paul, Owens* or *Gomez* v. *Toledo,* 446 U.S. 635 (1980).

The District Court's opinion leads to the conclusion that public employment deserves more protection from government interference than does private employment. Nowhere do the more recent decisions of *Owens, supra* and *Gomez, supra* hold that private employment is less deserving of constitutional safeguards than is public employment. Moreover, *Paul, supra,* the case in which this court first observed "loss of employment plus stigma may amount to a sufficient interest to invoke the procedural protection of the Due Process Clause", did not involve a public employment case. Petitioner contends it was not the intention of *Bishop* or *Paul, supra* to limit the remedy afforded by Section 1983 to a select group or class such as public employees, but that Section 1983 by its plain language must apply to "any citizen" who is deprived of any rights, privileges or immunities secured by the Constitution. *Truax, supra, Feinberg, supra,* and *Stokes, supra.*

Petitioner McNew begs this court to take the opportunity presented by this case to announce a construction of Section 1983 which is in harmony with Congressional intent as this Court has held in *Truax, Owens* and *Gomez, supra.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Appendix

APPENDIX A

NO. 80-3473

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

R. PAUL McNEW,

Plaintiff-Appellant,

v.

THE BANK OF COUNT VERNON; JOHN W. WILLIAMS, individually and as Commissioner of Banking and Securities of Kentucky; ROSAMOND BROWN; JESS F. BULLOCK; JERRY J. COX; CARL R. CLONTZ; CLONTZ & COX; W. E. HUNT; J. STEPHEN OWENS, individually and as Bank Examiner, Banking & Securities; LOIS M. SMOCK & TRACY FARMER,

Defendants-Appellees.

ORDER

(Filed December 22, 1981)

BEFORE: WEICK and LIVELY, Circuit Judges; and GUY,* District Judge.

* The Honorable Ralph B. Guy, Jr., Judge, U.S. District Court for the Eastern District of Michigan, sitting by designation.

The plaintiff appeals from dismissal of a civil rights action pursuant to 42 U.S.C. § 1983. The district court found that the plaintiff's complaint had met one of the requirements for stating a cause of action pursuant to Section 1983 in that it alleged injury to the plaintiff by defendants who were acting under color of state law. However, the district court found that the complaint failed to allege the second requirement of a cause of action under Section 1983, that a right protected by the Constitution of the United States has been infringed by the defendants. On this basis a motion to dismiss was granted.

After careful consideration of the complaint and giving every allegation thereof full credit, we conclude that the complaint did fail to state a claim under 42 U.S.C. § 1983. This result is particularly required by the holdings of the Supreme Court in *Paul* v. *Davis*, 424 U.S. 693 (1976); and *Bishop* v. *Wood*, 426 U.S. 341 (1976). As this court stated in *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673, 679 (6th Cir. 1976), *cert. denied*, 430 U.S. 946 (1977), "Section 1983 does not create a remedy for every wrong committed under color of state law. Only deprivations of rights secured by the Constitution and laws of the United States are actionable." (Citations omitted).

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By /s/ GARY McCARTHY
Deputy Clerk

Issued as Mandate: January 27, 1982
Costs: None

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 77-69

R. PAUL McNEW,

Plaintiff,

vs.

THE BANK OF MT. VERNON, ET AL.,

Defendants.

ORDER

(Filed December 28, 1979)

Various defendants having filed motions to dismiss this complaint, and the Court being sufficiently advised through memoranda filed by plaintiff and defendants, for the reasons set forth in the Memorandum of even date, it is hereby

ORDERED AS FOLLOWS:

1. The motions to dismiss be and are granted. Rule 12 (b) (6), FED.R.CIV.P.

2. This complaint be and is dismissed, but the case will remain on the docket of this Court, pending on the counterclaims.

3. The parties are granted a period of twenty days from the date of this Order within which to show why the counterclaims should not also be dismissed.

4. At the expiration of twenty days, the Clerk of the Court will forward the file to the undersigned Judge for a consideration of the dismissal of the counterclaims.

This 28th day of December, 1979.

/s/ EUGENE E. SILER, JR.
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 77-69

R. PAUL McNEW,

Plaintiff,

vs.

THE BANK OF MT. VERNON, ET AL.,

Defendants.

MEMORANDUM

(Filed December 28, 1979)

This is a suit brought pursuant to 28 U.S.C. § 1343 (1) to recover money damages under 42 U.S.C. § 1983 and 42 U.S.C. § 1985 (3). The plaintiff, R. Paul McNew, is a former executive of the Bank of Mt. Vernon. He alleges that in an attempt to force him out of his position at the bank, a group of other bank employees and directors who were unfriendly to him tried on several occasions to discredit him with various regulatory and enforcement agencies (the F.B.I., the F.D.I.C., and the State Banking Commission). He was arrested on one occasion by the F.B.I., on a complaint alleging that he had abstracted funds from the bank, although the pleadings do not disclose the ultimate outcome of that charge. Eventually, the State Commissioner of Banking and Securities intervened, and, allegedly acting in

concert with the plaintiff's enemies at the bank, coerced the plaintiff into resigning his position with the bank, allegedly in violation of Kentucky's criminal laws. These actions are claimed to have been part of a conspiracy on the part of some state officials and bank employees to deprive the plaintiff of his job and to defame him without due process of law, in violation of 42 U.S.C. § 1983 and § 1985 (3). There is a pendent state law slander and libel claim.

This case is now before the Court for consideration of the six motions to dismiss filed on behalf of the various defendants. For the reasons discussed below, the Court finds that the complaint must be dismissed for failure to state a claim upon which relief may be granted. The Court's resolution of the case makes it unnecessary for the Court to consider qualified executive immunity and Eleventh Amendment issues raised by some of the defendants. Besides, there is insufficient evidence before the Court now to determine these issues. For instance, on the issue of the Eleventh Amendment, the Court would have to determine whether a judgment against Williams here would be paid from the state treasury. See *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Moreover, on the issue of official immunity, facts would have to be developed to see if the officials were acting in good faith. See *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

It is well established that a complaint may not be so dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). All allegations of the complaint must be taken as true for the purpose of ruling on a motion to dismiss. *Cooper* v. *Pate*, 378 U.S. 546 (1964).

Despite these principles, it is clear that the cause of

action based on 42 U.S.C. § 1985 must be dismissed. The plaintiff does not allege the required "racial, or perhaps otherwise class-based, individiously discriminatory animus" which must be present to have a cause of action under that statute. *Griffin* v. *Breckenridge,* 403 U.S. 88, 102 (1971). *Accord, Smith* v. *Martin,* 542 F.2d 688 (6th Cir. 1976), *cert. denied,* 431 U.S. 905 (1977). Therefore, even if all the plaintiff's allegations are true, he has failed to state a cause of action under 42 U.S.C. § 1985.

The plaintiff's claim under 42 U.S.C. § 1983 presents a more difficult problem. Both plaintiff and defendant agree that to state a cause of action under that statute, the complaint must allege specific overt acts which show: (1) that the defendants acted "under color of" state law and (2) that the defendants have deprived plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States. If one accepts the allegations of the complaint as true, as required, then it seems that the actions of defendants Williams and Owens, both officials of the Kentucky Department of Banking and Securities, were under color of state law. See *Kletschka* v. *Driver,* 411 F.2d 436, 447 (2d Cir. 1969). As to the private individual defendants, the complaint alleges that they joined, acted in conspiracy with or cooperated with these state officials, and this allegation is enough to satisfy the first requirement of an action under 42 U.S.C. § 1983. *Adickes* v. *Kress & Co.,* 398 U.S. 144, 152 (1970).

The fulfillment of the second requirement, that there be a deprivation of a right, privlege, or immunity secured by federal law, is hotly disputed. In his memorandum in opposition to the motion to dismiss, plaintiff apparently concedes that he had no constitutionally protected property interest in his employment status. It is claimed, however, that he had a "constitutionally protected right to

be free from exertion of the power of a state official's office to interfere with his employer-employee relationship," citing *Stokes* v. *Lecce,* 384 F. Supp. 1039 (E.D. Pa. 1974), in support of his proposition that such a right exists. In the *Stokes* case, an official of the Pennsylvania State Racing Commission allegedly used the power of his office to deprive the plaintiff of his job as a racing judge with a private employer. This is the only case cited by the plaintiff to support his assertion that such a federally protected right exists. The Court's own research has not located any other cases following the rationale of *Stokes.* The *Stokes* opinion did not cite any prior cases as authority for this conclusion. The Court which issued the *Stokes* opinion did not have the benefit of the Supreme Court's reasoning in the subsequent cases of *Bishop* v. *Wood,* 426 U.S. 341 (1976), and *Paul* v. *Davis,* 424 U.S. 693 (1976). To determine whether one has a constitutionally protected property or liberty interest, state law must be consulted, and there appears to be no state law providing for a property interest under the facts of this case.

Plaintiff McNew contends that he would not have lost his job except for the threats and coercion of Williams, a state official who was part of the conspiracy. While this may constitute a state law claim of tortious interference with a contract, this is not a cognizable federal claim. See *Ohio Inns, Inc.* v. *Nye,* 542 F.2d 673, 680 (6th Cir. 1976), *cert. denied,* 430 U.S. 946 (1977). In *Paul* v. *Davis,* 424 U.S. 693, 700 (1976), the Supreme Court held that a § 1983 plaintiff must be able to point to a "specific constitutional guarantee safeguarding the interest he asserts has been invaded." In that case, the Supreme Court declined to adopt the Fourteenth Amendment as a source of general federal tort law, rejecting the contention that § 1983 and the Due Process Clause made actionable any wrongful in-

jury inflicted by a state employee. Although McNew's loss of his job was a serious injury, he has not pointed out any "specific guarantee safeguarding the interest he asserts has been invaded," aside from the general provisions of the Fourteenth Amendment, which *Paul* v. *Davis, supra* at 699, explicitly held insufficient to support a § 1983 action.

The plaintiff's memorandum points to some statements from *Paul* v. *Davis, supra,* to support a contention that defamation plus loss of employment is a sufficient interest to invoke the procedural protection of the Due Process Clause. It is this Court's opinion that those statements (424 U.S. at 701) refer to situations involving the loss of *public,* not private employment, such as in *Colaizzi* v. *Walker,* 542 F.2d 969 (7th Cir. 1976) *cert. denied,* 430 U.S. 969 (1977). In any event, as the plaintiff concedes in his Memorandum in opposition to the motion to dismiss, the statements are merely dicta.

As the plaintiff has not stated a federal cause of action, this Court has no jurisdiction over his pendent defamation claim. Before pendent jurisdiction can be exercised, "[t]he federal claim must have substance sufficient to confer subject matter jurisdiction on the court." *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 725 (1966). "Transfer of jurisdiction to federal courts cannot be accomplished by the procedural device of filing an unsubstantial action under § 1983, coupled with a prayer for the exercise of pendent jurisdiction." *Bates* v. *Dause,* 502 F.2d 865, 867 (6th Cir. 1974).

As the Supreme Court stated in *Bishop* v. *Wood,* 426 U.S. 341, 349 (1976). "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." This demurrer applies equally to personnel deci-

sions made by private employers, even when the private employer is allegedly influenced by a state official.

If all plaintiff's allegations were true, as was assumed for the purpose of ruling on these motions to dismiss, then the defendants may have been guilty of reprehensible conduct, which seriously injured the plaintiff. However, there is no general federal tort law. As there is no federal remedy, plaintiff's only avenue of redress is any state cause of action he may have. See *Sullivan* v. *Brown*, 544 F.2d 279 (6th Cir. 1976). This federal complaint must be dismissed. Nevertheless, as there are certain pending counterclaims, it will remain on the docket.

An appropriate Order will be entered.

This 28th day of December, 1979.

/s/ EUGENE E. SILER, JR.
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 77-69

R. PAUL McNEW,

Plaintiff,

vs.

THE BANK OF MT. VERNON, ET AL.,

Defendants.

ORDER

(Filed April 21, 1980)

The plaintiff having moved the Court to vacate its Order of December 28, 1979, or, in the alternative, to enter a final judgment so that an appeal may be taken, it is hereby

ORDERED AS FOLLOWS:

1. All other parties are granted a period of twenty (20) days from the date of this Order within which to file a response thereto.

2. At the expiration of twenty (20) days, the Clerk of the Court will forward the file to the undersigned Judge for his consideration of the motion.

This 21st day of April, 1980.

/s/ EUGENE E. SILER, JR.
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 77-69

R. PAUL McNEW,

Plaintiff,

vs.

THE BANK OF MT. VERNON, ET AL.,

Defendants.

MEMORANDUM

(Filed June 12, 1980)

In December, 1979, this Court dismissed plaintiff's claim but ordered that the case remain on the docket for a short time to give defendants an opportunity to proceed with their counterclaims if they wished to do so. Plaintiff began an appeal of the order of dismissal which was voluntarily withdrawn, apparently after plaintiff determined that no final judgment had yet been entered. Although put on notice to state their intentions, the defendants have never indicated whether they would proceed with their counterclaims. The matter is now before the Court on plaintiff's motion under Rule 60(b), Federal Rules of Civil Procedure (F.R.CIV.P.) to vacate the order dismissing his claim, or alternatively, to enter a final judgment in the case. The

underlying facts of the case were detailed in this Court's Memorandum of December 28, 1979.

In support of plaintiff's Rule 60(b) motion to vacate, he asserts that because the newly discovered case *Traux* v. *Raich*, 239 U.S. 33 (1915), indicates that there is a constitutionally protected right to pursue one's livelihood, it was an error to dismiss plaintiff's employment dismissal claim for lack of a constitutionally protected interest in private employment. It will be assumed that newly discovered case law could fit within Rule 60(b)(6) as "any other reason justifying relief."

The *Truax* v. *Raich* decision is unpersuasive because:

a. Whatever controlling authority it may have had when promulgated in 1915 was severly undermined more recently when the Supreme Court decided *Bishop* v. *Wood*, 426 U.S. 341 (1976), and other employment-termination cases.

b. The Truax case dealt with an equal protection attack on a state statute which made it more difficult for an alien to get *any* job. In contrast, the instant case is a due process suit based on alleged informal acts by a state official which caused plaintiff to lose only a particular banking job. In *Board of Regents* v. *Roth*, 408 U.S. 564, 574 (1972), the Supreme Court distinguished *Truax* v. *Raich* on this basis as being inapplicable to a 42 U.S.C. § 1983 suit somewhat similar to the one at bar.

Finally, it is noted that a property interest in employment is not entitled to constitutional protection unless it is recognized by state law. *Parham* v. *Hardway*, 555 F.2d 139, 141 (6th Cir. 1977). Under Kentucky law, there is no property right in an expectation of continued private employment where the employment contract is terminable

at will. This is a well established principle. *See, e.g., Scroghan* v. *Krallco Corp.*, 551 S.W.2d 811 (Ky. Ct. App. 1977).

Since the *Truax* v. *Raich* case does not contain any reason why plaintiff's case should not have been dismissed, the motion to vacate the order of dismissal should be denied. Since the defendants have not indicated that they intend to proceed with their counterclaims, despite having been granted twenty days in which to do so, the motion to enter a final judgment should be granted.

An appropriate order and judgment will be entered.

This 12th day of June, 1980.

/s/ EUGENE E. SILER, JR.
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 77-69

R. PAUL McNEW

Plaintiff,

vs.

THE BANK OF MT. VERNON, ET AL.

Defendants.

JUDGMENT

(Filed June 12, 1980)

For the reasons set forth in the Memorandum of even date, it is hereby

ORDERED AND ADJUDGED that the plaintiff take nothing on the complaint, that defendants take nothing on the counterclaim, that the action be dismissed, and that the defendants recover of the plaintiff their costs of this action.

This 12th day of June, 1980.

/s/ EUGENE E. SILER, JR.
Judge

Opposition

No. 81-1711

Supreme Court, U.S.
FILED
APR 17 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

R. PAUL MCNEW
Petitioner

v.

THE BANK OF MT. VERNON, ET AL.*
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

The sole question presented by this case is whether the complaint, as amended, brought by an employee of a private banking institution for damages allegedly resulting from the termination of his employment, states a claim pursuant to 42 U.S.C. 1983.

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No. 81-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

R. PAUL MCNEW
Petitioner

v.

THE BANK OF MT. VERNON, ET AL.*
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents, The Bank of Mt. Vernon, John L. Williams, Jess F. Bullock, Rosamond Brown, Jerry J. Cox, Carl R. Clontz, Clontz & Cox, W. E. Hunt, J. Stephen Owens, Lois M. Smock and Tracy Farmer, oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 22, 1981.

COUNTERSTATEMENT OF THE CASE

Invoking federal jurisdiction under 28 U.S.C. §1343(1), for claims based upon 42 U.S.C. §§1983 and 1985, the Petitioner, R. Paul McNew, filed his complaint in March, 1977, alleging that he was forced to resign from his employment at the Bank of Mt. Vernon as a result of a conspiracy among officials of Kentucky's Banking and Securities Commission, acting under color of state law, and various private parties -- including certain officers and directors of the Bank of Mt. Vernon in Mt. Vernon, Kentucky. The complaint was initially devoid of any factual allegations, but later was amended to include a specific recitation of alleged wrongful and criminal conduct by John L. Williams, then Kentucky's Banking and Securities Commissioner, and J. Stephen Owens, a bank examiner. A second count of the complaint set forth claims against the defendants for defamation, over which a federal court may have jurisdiction only as pendant state claims.

The various defendants filed motions to dismiss the complaint, contending that the claim under Section 1985 was defective for failure to allege any racial or class-based discrimination and further contending that the Section 1983 claim must be dismissed because Mr. McNew's employment status with the Bank of Mt. Vernon did not constitute a right, privilege or property interest secured by the

Constitution of the United States. The District Court granted the motions to dismiss and a final judgment was entered on June 12, 1980. The United States Court of Appeals for the Sixth Circuit affirmed the District Court's ruling on December 22, 1981.

Petitioner has abandoned his claim under Section 1985, and the issue before this Court is restricted to whether the complaint, as amended, alleges facts sufficient to state a claim pursuant to Section 1983. The complaint alleges that as a direct result of certain specified, and allegedly criminal, acts and statements of Respondents Williams and Owens, acting as officials of Kentucky's Banking and Securities Commission and under color of state law, and in concert with the other named Respondents, Mr. McNew was "denied due process of law" and was "wrongfully terminated" (or was forced involuntarily to resign) from his employment at the Bank of Mt. Vernon. The complaint also alleges that Mr. McNew's reputation was damaged by the alleged wrongful and defamatory conduct. Mr. McNew concedes that he had no contract of employment at the Bank of Mt. Vernon and served at the will of the Bank's Board of Directors. The complaint also makes no allegation that Mr. McNew had any property interest in the continuation of his employment, nor any more than a unilateral expectation of its continuation.

The Court of Appeals said:

> After careful consideration of the complaint and giving every allegation thereof full credit, we conclude that the complaint did fail to state a claim under 42 U.S.C. §1983. This result is particularly required by the holdings of the Supreme Court in *Paul* v. *Davis*, 424 U.S. 693 (1976) and *Bishop* v. *Wood*, 426 U.S. 341 (1976).

See Petition for a Writ of Certiorari, p. 2a. This Petition followed.

SUMMARY OF ARGUMENT

The Courts below correctly applied the standards promulgated by this Court in ruling that the Petitioner had no federally protected property right or interest in his continued employment by a private banking institution. Moreover, allegations of loss of private employment coupled with alleged defamation, even where allegedly inflicted by a state official, do not create a claim under Section 1983. Petitioner's claim, if any, is founded exclusively on state law and Petitioner's forum for presenting that claim is in state court.

ARGUMENT

As recognized by both the District Court and the Court of Appeals, the decisions by this Court in *Bishop* v. *Wood*, 426 U.S. 341 (1976), and *Paul* v. *Davis*, 424 U.S. 693 (1976), compel the conclusion that Petitioner's loss of his employment at a private banking institution, even when coupled with allegations of defamation, simply do not give rise to a claim under Section 1983. The Petitioner can provide no authority from this Court or any other federal court to support the proposition that loss of employment in the private sector can create a federal claim under Section 1983. Essentially, Petitioner invites this Court to hold that any loss of employment, coupled with claims of defamation, will constitute a cognizable federal claim under Section 1983. It is respectfully submitted that no authority currently exists for such a drastic expansion of Section 1983 or this Court's rulings in *Bishop* v. *Wood* and *Paul* v. *Davis*.

Interpreting the previous decision in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971), this Court in *Paul* v. *Davis* stated that in addition to injuring a person's reputation, the government must deprive the person of a right previously held under state law in order for a violation of his liberty interests to be made out. *Paul* v. *Davis*, *supra* at 707-709. This dicta in *Paul* v. *Davis*, is the basis upon which the Petitioner invites this Court to

expand the scope of Section 1983 into the realm of private employment. Petitioner chooses to ignore the critical and dispositive fact that his status as an employee at the Bank of Mt. Vernon was terminable at the will of either party. Accordingly, Petitioner's status as an employee at a private banking institution simply does not constitute a right held under state law.

Indeed, under Kentucky law, absent an employment contract or other written agreement establishing the terms of employment or conditions for termination thereof -- and no such agreement is here alleged -- the employment relationship is terminable at the will of either the employer or employee. In *Greer* v. *National Carbide Co.*, 186 F.Supp. 18, 19 (W.D. Ky., 1960), Judge Shelbourne emphasized that under Kentucky law,

> When the term of service is left to the discretion of either party or when not for a definite period, either party has the right to terminate it at any time, and no cause therefore need be alleged or proven. (Citing *Gambrel* v. *United Mine Workers of America*, Ky., 249 S.W.2d 158, 159).

This Petitioner, employed by a private banking institution, served at the pleasure of the Bank's board of directors. His discharge -- wrongful or not -- infringes no constitutionally protected property right.

This Court frequently has indicated that in some circumstances the loss of *public* employment, accompanied by the stigma of defamation, may create a claim under Section 1983. *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578 (1972); *Paul* v. *Davis*, *supra* at 1163, 1165; *Codd* v. *Velger*, 429 U.S. 624 (1977); *Owen* v. *City of Independence*, 445 U.S. 622 (1980). However, in every case in which this Court has upheld the validity of a Section 1983 claim based upon employment status, that employment status has been elevated to a "property" right by virtue of being public employment or has been elevated to a property right by operation of governmental law or regulation. It is only under the unique circumstance of public employment or employment subject to governmental law or regulation, that a due process deprivation cognizable under Section 1983 may be created by termination of that employment.

Even in the public employment sector, however, this Court has cautioned against allowing Section 1983 to become a vehicle for federal judicial review of personnel matters.

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by *public agencies*. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The

> United States Constitution cannot feasibly be construed to require federal review for every such error. In the absence of any claim that the *public employer* was motivated by a desire to curtail or penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways.

Bishop v. *Wood, supra* at 349 (emphasis supplied).

The Petitioner urges that the decision of the Court of Appeals for the District of Columbia in *Feinberg* v. *F.D.I.C.*, 522 F.2d 1335 (D.C. Cir. 1975), is at conflict with the holding of the Court of Appeals in this litigation. *Feinberg*, of course, does not involve a claim brought under Section 1983. However, Petitioner nonetheless invites comparison to *Feinberg* because it involved suspension of an employee at a private banking institution. In *Feinberg*, the appellant had been suspended from his employment by order of the F.D.I.C. after indictment by a federal grand jury. The court held that F.D.I.C. regulations required that the "appellant (should) be entitled to the benefit of a hearing or some form of administrative proceeding absent a compelling governmental interest temporarily overriding his right to the full compliment of due process safeguards." *Feinberg, supra* at 1340.

Feinberg therefore offers no conflict with the holding of the Court of Appeals in this case. This Petitioner's employment, unlike Feinberg's, was terminated by the private employer, not by order of a governmental entity. Unlike Feinberg, this Petitioner alleges no statute or regulation requiring a hearing or administrative proceeding to be employed prior to his termination. Contrary to Petitioner's assertion, the holding in *Feinberg* does not create a conflict between the circuits requiring review by this Court.

Petitioner's reliance upon *Stokes* v. *Lecce*, 384 F.Supp. 1039 (E.D.Pa. 1974) is misplaced for the same reasons. As Judge Luongo (who decided *Stokes*) explained in the later case of *McKnight* v. *Southeastern Pennsylvania Transp.*, 438 F.Supp. 813, 827 (E.D.Pa. 1977), it was failure to follow established state regulations and procedures in terminating Stokes' employment which created a due process violation and gave rise to a Section 1983 claim. Again, the termination of this Petitioner's employment by the board of directors of a private bank violates no due process safeguards and deprived Petitioner of no federally protected right.

Also unpersuasive is Petitioner's assertion of due process violations arising because he was allegedly denied an opportunity to consult with counsel prior to the termination of his employment. Petitioner cites no authority for the unique and

unsupportable proposition that a private employer must allow an employee to consult with counsel before terminating his employment.

As recognized by the District Court and the Court of Appeals, this Petitioner is not without a forum to hear his allegations of defamation and interference with his employment relationship. That forum, however, is not a federal court. Similarly, petitioner is not without statutory authority for presenting claims for defamation and loss of employment. However, that statutory authority is not Section 1983. As this Court has noted in limiting the scope of the anti-injunction provisions of the Internal Revenue Code:

> This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different.

Bob Jones University v. *Simon*, 416 U.S. 725, 746 (1974). Similar limitations must be employed here in rejecting Petitioner's invitation to vastly expand the scope of Section 1983.

It is respectfully submitted that this Petitioner's claims are properly and solely made by asserting violations of state law in the state courts of Kentucky. For this Court to hold otherwise would represent an enormous expansion of this Court's previous rulings and the scope of Section 1983. In

Sullivan v. *Brown*, 544 F.2d 279, 284 (6th Cir. 1976) the Court of Appeals properly concluded that this Court's decisions in *Bishop* v. *Wood* and *Paul* v. *Davis* make it palpably clear that

> Section 1983 was never intended as a catchall statute under which myriads of suits, traditionally within the exclusive jurisdiction of the state courts may be filed in federal courts, in the absence of a showing of deprivation of a constitutional right. Plaintiff's right of action is within the exclusive jurisdiction of the (state) courts. . . .

The courts below found that Petitioner's complaint fails to state a claim under Section 1983. Petitioner has advanced no compelling reasons nor cited any authority which would require this Court to review that holding.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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